

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 6, 2006 Session

LYUBOV M. LEE v. DAVID CRAIG LEE

**Appeal from the Fourth Circuit Court for Knox County
No. 90743 William H. Inman, Senior Judge, by Designation**

No. E2006-00599-COA-R3-CV - FILED FEBRUARY 20, 2007

Lyubov M. Lee (“Wife”) and David C. Lee (“Husband”) were married in May of 1995, and divorced in May of 2003. The parties have one child, an eight year old son. The divorce was contentious, at best, and this behavior continued following the divorce. When the divorce was granted to Wife, the Trial Court ordered Husband to pay Wife’s attorney fees of \$65,000. The parties’ continuing inability to agree on anything resulted in numerous post-divorce motions being filed, including petitions for contempt filed by both parties. Husband paid a total of \$20,000 of Wife’s post-divorce attorney fees. This appeal involves Wife’s request for an additional \$28,845 in post-divorce attorney fees. Following a hearing, the Trial Court refused to award Wife any additional attorney fees. The Trial Court also stated that it would not hear any future requests for attorney fees. Wife appeals. Finding no abuse of discretion, we affirm the Trial Court’s judgment refusing to award Wife any additional attorney fees already incurred by the time of that hearing. However, we vacate that portion of the Trial Court’s judgment holding that neither party could file a request for attorney fees in the future.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Fourth Circuit Court
Affirmed in Part and Vacated in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Wanda G. Sobieski, Diane M. Messer, and Cynthia L. Chapman, Knoxville, Tennessee, for the Appellant, Lyubov M. Lee.

J.D. Lee, Knoxville, Tennessee, for the Appellee, David C. Lee.

OPINION

Background

This appeal involves a request for attorney fees arising from post-divorce litigation following a very contentious divorce between Husband and Wife. The parties were married in May of 1995, and have a now eight year old son. Wife filed a complaint for divorce in April of 2002. The trial was on February 19, 25, and 26 of 2003, as well as March 4, 5, 11, 12, and 26 of that same year. A final judgment granting Wife a divorce was entered in May of 2003. In the final judgment, the Trial Court noted that Husband was an attorney in Knoxville. Wife had obtained a Bachelor's Degree from the University of Tennessee and, at the time of trial, was pursuing a Master's Degree to become a nurse practitioner. The final judgment also provides:

Each of the parties shall be residential custodians of equal legal status and decision making subject to the limitations hereafter delineated.

With regard to time sharing the Court believes the parties should continue to cooperate in structuring time sharing, but will not shirk its duty to set down absolutely specific schedules if that should become necessary. Time sharing shall approach 50/50 should father be able to exercise such time meaningfully

When the Child Support Referee comes to set child support in this cause she shall set the support as to time sharing on the assumption that time sharing with the father shall be 120 overnights per year....

The Referee is directed to the preceding findings as to father's income¹ and also to the finding of the Court's own witness that the father has the ability to earn an average of at least \$84,000 to \$89,000 per year....

Father shall maintain medical hospitalization insurance on [the child] ... [and uncovered] medical expenses ... , including deductibles, if any, will be borne by father and mother equally....

The relative ability for future acquisition of capital and income is disparate. Hers will be admirable, his will be magnificent....

¹ The Trial Court found Husband's income to be \$54,000 per year for 1995 through 1999; \$90,000 in 2000; \$197,000 in 2001; and \$120,000 in 2002.

The trial court then divided the marital assets. Wife was awarded the marital home and the equity in that home, as well as the corresponding indebtedness. Husband was awarded an airplane and the corresponding indebtedness. Various other items of personal property were distributed. The trial court also divided the marital debt. The trial court awarded Wife rehabilitative alimony and child support in the amount of \$4,200 per month.² The trial court ordered the rehabilitative alimony to be paid for 39 months. Wife also sought payment of her attorney fees in the amount of \$66,038. The trial court awarded Wife attorney fees in the amount of \$65,000 as additional alimony.

Unfortunately, after entry of the final judgment of divorce, this case was far from over. The parties continued to file numerous motions over many months. These motions addressed various matters, including the amount of child support and alimony awarded, whether it was being paid timely, the amount of Husband's co-parenting time, the child's attendance at private schools, etc. In addition, both parties claimed the other party was making denigrating remarks in front of the child and both parties filed various petition(s) for contempt.

In September of 2004, Wife filed a motion seeking payment of additional post-divorce attorney fees. Specifically, Wife sought an additional \$28,104 in fees, plus \$1,532.01 in costs. Wife also sought an additional \$13,138.14 in interest on the amount of the original attorney fee award that still had not been paid.

In February of 2005, Wife's original attorney, Wanda Sobieski ("Sobieski"), withdrew from the case and a new attorney began representing Wife. Various motions continued to be filed by both parties. In March of 2005, Wife filed a supplemental motion for attorney fees, seeking additional attorney fees in the amount of \$4,285.48.

In April of 2005, an Agreed Order was entered disbursing funds being held in a related lawsuit as follows³:

[Wife's original attorney,] \$55,000 attorney fees [for work performed] up until May 9, 2003, [the date of the divorce,] plus \$10,843.83 in interest, totaling \$65,843.83.

² The final judgment did not provide exactly how much of the \$4,200 was alimony and how much was child support. The Trial Court essentially determined that Wife needed a total of \$4,200 per month and ordered Husband to pay child support in an amount to be determined by the Referee, then pay alimony in an amount so that the child support plus the alimony equaled \$4,200 per month.

³ Certain funds were being held by the Knox County Chancery Court in litigation involving Husband's father and Sobieski. Very briefly, this litigation centered around funds contained in a trust account for attorney fees earned by Husband and Husband's father, who also is an attorney in Knoxville. The lawsuit involved a disagreement over the priority of payment of these funds. Because Sobieski was a party in this lawsuit and due to the potential for a conflict of interest, Sobieski withdrew from representing Wife. Once this related lawsuit was over, Sobieski resumed representation of Wife.

[Wife's second attorney of record], \$12,600.

In August of 2005, Wife's second counsel of record withdrew and Sobieski resumed representation of Wife.

A hearing was conducted on Wife's petition for an award of additional attorney fees. Sobieski testified at the hearing and acknowledged being awarded and paid approximately \$88,843.00 by the time of that hearing. Sobieski testified that Wife filed six petitions for contempt following entry of the final decree of divorce. Sobieski agreed that most of these petitions were resolved the day of the hearing but before a hearing took place. Only two of the petitions actually were resolved by the Trial Court. Sobieski testified that Husband filed a "whole bunch" of petitions, and Wife "ha[d] to file a response. And then if we needed information, we filed for discovery." In summary, Sobieski testified that the requested attorney fees were necessary, reasonable, and conformed to the usual hourly rate for attorneys practicing domestic law in Knoxville.

Husband testified to several of the motions he filed with the Trial Court following the divorce. For example, Husband filed a motion seeking clarification as to exactly how much of the monthly payment of \$4,200 was child support, and how much was alimony. Husband testified he filed far less than the 100 post-trial motions as claimed by Wife. Husband stated that the original Judge assigned to this case refused to hear many of Husband's motions because, in the Judge's opinion, Husband had failed to comply fully with the court's original order. Therefore, many of Husband's motions never were considered by the Trial Court. Husband added that several of his motions pertained to his attempts to seek co-parenting time with his son because Wife and her attorney had taken an unreasonable position as to the proper amount of co-parenting time Husband should have. According to Husband, if Wife and Sobieski had been reasonable, the amount of post-divorce attorney fees incurred would have been substantially less.

Following the hearing, the Trial Court entered an order stating, *inter alia*, as follows:

A final judgment was entered in March 2003, following a trial over an intermittent period of about three months.

The issue centered on custody and visitation of a son, now seven (7) years old. The Court awarded custody of the son to his mother, together with \$4,200 monthly ... as "alimony and child support." There was no separation of these awards. In any event, the parties agree that, as of October 2005, this amount is current and not disputed.

Before the undersigned... judge is the motion of [Wife's attorney] for additional attorney fees in the amount of \$28,845.00, as nearly as may be seen. [Husband] claims he should not be onerated

with this amount because the claimed additional fees are unreasonable, unnecessary and excessive.

[Wife] has filed, since the divorce, six (6) petitions for contempt, only two (2) of which apparently came before the Court. She says that Mr. Lee filed one hundred (100) motions. This assertion is not supported by the proof; Mr. Lee filed a number of motions seeking visitation, apparently none of which [were] heard, or at best, only required a brief appearance.

To this date, [Sobieski] has been awarded \$88,843.00 fees in this case: \$5,000 in 2002, \$10,000 in August, \$65,843 in April 2005, and \$8,000 in 2005. If she is awarded the additional amount claimed, this simple domestic relations case - *one child, minimal assets* - would involve an attorney fee in excess of \$125,000, *excluding* a fee of \$12,000 paid by [Husband to Wife's second attorney of record]. These amounts, further, do *not* include attorney fees paid by [Husband] to his attorneys.

To repeat, the attorney for Ms. Lee has been paid \$88,843.00 for representing [Wife] in this no-asset case involving one child. Intransigent clients are grist for lawyer's mills, and we have tried to determine just how much of this unpleasantness [Wife] caused by her intransigence. In any event most of the claimed work was unnecessary, or mistaken, or exaggerated, or unreasonable, as to both parties, *ab initio*. [Husband] brought much of this on himself, but even so, there are limitations. Enough is enough.

The motion for additional fees is denied, and this Judge, will not entertain any further motions or petitions for fees in this case. Costs are assessed to [Wife]. (emphasis is original)

Wife appeals claiming the Trial Court erred when it refused to award her an additional \$28,845 in attorney fees. Wife's next issue is her claim that the Trial Court erred when it stated that it would not entertain any future requests for attorney fees. Wife's final issue is a request for an award of attorney fees incurred on this appeal.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference

to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Wife’s request for attorney fees was made in large part pursuant to Tenn. Code Ann. § 36-5-103(c) (2005). This statute provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

The express language of Tenn. Code Ann. § 36-5-103(c) is such that an award of attorney fees is by no means automatic. The statute says attorney fees “may” be awarded “in the discretion” of the court. Therefore, we must determine if the Trial Court abused that discretion. Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001), stating:

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

Wife argues on appeal that the Trial Court, when denying her petition for post-divorce attorney fees, failed to properly consider the factors set forth in *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980). In *Connors*, our Supreme Court stated:

The appropriate factors to be used as guides in fixing a reasonable attorney's fee have been phrased in various terms over the years, but may be summarized as follows:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

See Folk v. Folk, 210 Tenn. 367, 379, 357 S.W.2d 828, 829 (1962). These are substantially the guidelines listed in Supreme Court Rule 38, Code of Professional Responsibility, D.R. 2-106. The additional factors listed in Rule 38 should be given consideration when relevant.

Connors, 594 S.W.2d at 676-77.

At the outset, we note that Husband correctly argues that Wife never brought the factors listed in *Connors* to the Trial Court's attention. It appears from the record before us that *Connors* was not mentioned at the hearing or in Wife's post-hearing memorandum filed in support of her petition. Wife also fails to mention that in *Connors*, the trial court awarded the wife \$20,000 in attorney fees, which was affirmed by this Court. However, the Supreme Court determined that the amount of fees awarded was excessive, stating:

We adhere to the long established rule of *Holston National Bank v. Wood*, 125 Tenn. 6, 140 S.W. 31 (1911), that this Court will not interfere with the allowance of attorney's fees by the trial court unless we can see that some injustice has been perpetrated. However, this Court is not bound either by the expert opinion of lawyers as to the value of professional services or the action of the lower courts when in our judgment the fees allowed are excessive or inequitable. *See Carmack v. Fidelity-Bankers Trust Co.*, *supra*, and *Fiedler v. Potter*, 180 Tenn. 176, 189, 172 S.W.2d 1007, 1012 (1943). Our review of this fully developed record of the services rendered,

applying the guidelines listed herein leads us to the definite and firm conviction that the fee awarded is excessive and that it should be reduced to the sum of \$12,500....

Connors, 594 S.W.2d at 677.

In *Richardson v. Spanos*, 189 S.W.3d 720 (Tenn. Ct. App. 2005), we stated:

There is no question that Tenn. Code Ann. § 36-5-103(c) (Supp. 2004) empowers the courts to award reasonable attorney's fees incurred by persons who are required to return to court to enforce a child support order. *See, e.g., Huntley v. Huntley*, 61 S.W.3d at 341. These decisions address themselves to the trial court's discretion, *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995), and we review them using the less stringent "abuse of discretion" standard of review. Accordingly, we will reverse a trial court's decision with regard to awarding attorney's fees in cases such as this one only when the trial court applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d at 467; *Clinard v. Blackwood*, 46 S.W.3d at 182.

Both parties in this case were partially successful. Ms. Richardson has prevailed with regard to her request that Dr. Spanos be required to pay a portion of their son's tuition at Currey Ingram. However, Dr. Spanos has prevailed on his claim that he was entitled to a decrease in his base child support because of the decrease in his income. Thus, neither party is a clear winner, and more importantly, their child is no better off as a result of this litigation than he would have been had the parties decided to settle these issues by agreement instead of resorting to the courts. Under these circumstances, we decline to find that the trial court abused its discretion by denying both parties' requests for attorney's fees.

Richardson, 189 S.W.3d at 729.

In the present case, we note that both parties enjoyed some success on post-divorce matters directly involving the child, such as the payment of child support and the amount of Husband's co-parenting time. Although Husband did not receive payment of his attorney fees for those matters in which he was successful, Wife's attorneys were awarded and paid \$20,000 for post-divorce litigation. More specifically, the Trial Court found that Sobieski had been paid \$8,000 for

post-divorce attorney fees, and Wife's second attorney had been paid \$12,000 for post-divorce attorney fees.

At the hearing, the Trial Court was confronted with testimony by Sobieski and Husband regarding the propriety of the various post-trial motions and other pleadings. The Trial Court asked both Sobieski and Husband numerous questions during the hearing so that it fully understood exactly what had taken place and what each party was claiming. In short, the Trial Court concluded that, excluding the \$100,843 already paid by Husband for Wife's attorney fees, both sides should be responsible for the remainder of their own attorney fees because "most of claimed work was unnecessary, or mistaken, or exaggerated, or unreasonable, as to both parties" From the record before us, we cannot say that the evidence preponderates against this finding. Accordingly, we conclude that the Trial Court applied the appropriate legal standard and did not abuse its discretion when it refused to order Husband to pay Wife as attorney fees, in addition to the \$100,843 already paid, an additional \$28,845.⁴

Wife's next issue is her claim that the Trial Court erred when it stated that it would not entertain any future requests for attorney fees. We surmise that this was the Trial Court's attempt to suggest to the parties and their attorneys that they need to attempt to resolve any future disputes in an amicable manner. Regardless of the underlying reason for the Trial Court's stated refusal to entertain any future attorney fee requests, we conclude the Trial Court erred in making this pronouncement. The Trial Court's attempt to exercise its discretion by denying any request for future attorney fees before such a request was made is contrary to the clear legislative intent expressed in Tenn. Code Ann. § 36-5-103(c). We vacate only that portion of the Trial Court's judgment holding that it would not hear any future requests for payment of attorney fees. In the future, if either of the parties demonstrates to the Trial Court that they are entitled to an award of attorney fees under applicable law for matters subsequent to those matters giving rise to this appeal, the Trial Court should award those attorney fees as appropriate.

Wife's final issue is her claim for attorney fees incurred on appeal. Given our resolution of Wife's primary issue on appeal, we do not believe it is appropriate to award any attorney fees incurred on appeal.

⁴ Wife filed a document on appeal titled "Erratum" in which Wife seeks to "correct the record." According to Wife, the \$12,000 paid to Wife's second attorney was for back child support, not attorney fees. Husband responded, arguing that the funds were for payment of attorney fees. The Trial Court's order clearly states that this money was paid for attorney fees. If that determination was incorrect, Wife should have brought the error to the attention of the Trial Court. Mother's motion titled "Erratum" is, therefore, denied. In so doing, we note that even if the payment of \$12,000 was for child support as opposed to attorney fees, this would not materially change our resolution of the issues on appeal.

Conclusion

The judgment of the Trial Court is affirmed in part and vacated in part. This cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Lyubov M. Lee, and her surety, and one-half to the Appellee, David C. Lee.

D. MICHAEL SWINEY, JUDGE